83-1323

NO. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD C. COX, RALPH J. RANSDELL, SR., PAULA JEAN SYMPSON SMITH — APPELLANTS

V.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; EDGAR WALLACE, JOHN WIGGINGTON, JOE JASPER, ANNE V. GABBARD, MARY C. McNEESE, J. H. COMBS, ELEANOR H. LEONARD, FRED BROWN, WILLIAM RICE, LYMAN GINGER, PAUL ROSE, CAROL JACKSON, DONALD BLEVINS, ANN ROSS and JAMES TODD, MEMBERS OF THE LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; JAMES G. AMATO, MAYOR OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; LEXINGTON-FAYETTE COUNTY HEALTH DEPARTMENT, GORDON R. GARNER, COMMISSIONER OF PUBLIC WORKS OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — APPELLEES

* * * * * *

On Appeal from the Supreme Court of Kentucky

JURISDICTIONAL STATEMENT

WILLIAM C. JACOBS
173 North Limestone Street
Lexington, Kentucky 40507
(606) 254-9086

ATTORNEY FOR APPELLANTS

QUESTION PRESENTED - 1(a)

Does a statute [KRS 67A.875(6)] violate the due process clause to the 14th Amendment where the non-evidentiary hearing provided for by that statute is held at a time when a proposed special assessment tax to finance a sanitary sewer project is but an estimate, and landowners are prohibited by that statute from being heard on the amount of the assessment at that hearing, and no hearing or action to challenge the exact amount of the assessment is permitted to land owners when the exact amount of the assessment becomes irrevocably fixed, and a lien upon their properties?

TABLE OF CONTENTS - 1(c)

TABLE OF AUTHORITIES

CASES:

U.S. CONSTITUTIONAL PROVISIONS:

UNITED STATES STATUTES:

KENTUCKY STATUTES:

KENTUCKY STATUTES (Continued):

QUESTION PRESENTED - 1(a)

Does a statute [KRS 67A.875(6)] violate the due process clause to the 14th Amendment where the non-evidentiary hearing provided for by that statute is held at a time when a proposed special assessment tax to finance a sanitary sewer project is but an estimate, and landowners are prohibited by that statute from being heard on the amount of the assessment at that hearing, and no hearing or action to challenge the exact amount of the assessment is permitted to land owners when the exact amount of the assessment becomes irrevocably fixed, and a lien upon their properties?

LIST OF PARTIES
AT SUPREME COURT OF KENTUCKY - 1(b)

The caption of the case in this Court does not contain the names of all the parties to the proceeding in the court whose Judgment is sought to be reviewed. A list of all such parties is footnoted below.[1]

OPINIONS BELOW - 1(d)

The Opinion of the Supreme Court of Kentucky from which this appeal is taken, is officially recorded in 659 S.W.2d 190, (1983)

---

[1]Appellants: Richard M. Conrad, Helen Richardson, Paula Jean Sympson Smith, Ralph J. Ransdell, Sr., Helen M. Pena, Clifford Schlausky, E. J. Wagner and Richard C. Cox.

Appellees: Lexington-Fayette Urban County Government; Edgar Wallace, John Wiggington, Joe Jasper, Anne V. Gabbard, Mary C. McNeese, J. H. Combs, Eleanor H. Leonard, Fred Brown, William Rice, Lyman Ginger, Paul Rose, Carol Jackson, Donald Blevins, Ann Ross and James Todd, Members of the Lexington-Fayette Urban County Council; James G. Amato, Mayor of the Lexington-Fayette Urban County Government; Lexington-Fayette County Health Department; Gordon R. Garner, Commissioner of Public Works of the Lexington-Fayette Urban County Government.

and is set out in full in Appendix D, hereto.

The unreported opinion of the trial court, the Circuit Court, 22nd Judicial District, Third Division in and for Fayette County, Kentucky (Fayette Circuit Court, Civil Action No. 80-180), rendered the 16th day of August, 1982, is set out, in full, as Appendix A, hereto.

JURISDICTION - 1(e)

(i) The nature of this proceeding is an appeal by Richard C. Cox, Ralph J. Ransdell, Sr., and Paula Jean Sympson Smith, who are landowners of property which abut the construction of sanitary sewers by the Lexington-Fayette Urban County Government, a municipality of the Commonwealth of Kentucky.

Appellants appeal from the Final Judgment of the Supreme Court of Kentucky, the highest court in Kentucky, by reason of the Opinion of such court rendered August 31, 1983, and the Order denying Appellants' timely filed Petition for Rehearing, entered November 23, 1983,

which upheld the validity of a state statute which had been drawn in question as being repugnant to the due process clause of the 14th Amendment to the Constitution of the United States of America, and such Judgment of the Kentucky Supreme Court being in favor of validity.

The real property of Appellants has thereby become encumbered by a lien for the amount of a special benefit assessment tax, levied by the Appellee Government as a method to finance the cost of the sanitary sewer project.

The constitutional infirmity of the statute of which Appellants complain relates to the fact that the only hearing afforded Appellants under the statute, as not being held at a meaningful time and under meaningful circumstances as would permit Appellants to contest the amount of the special benefit assessment tax, renders the statute unconstitutional, as depriving Appellants of property without due process of law.

(ii) The date of the entry of the Judgment sought to be reviewed, is August 31, 1983, the date that the Opinion of the Supreme Court of Kentucky was rendered; the date that the Order of the Kentucky Supreme Court denying Appellants' Petition for Rehearing was entered is November 23, 1983[2]; the Notice of Appeal was filed in the Supreme Court of Kentucky was December 12, 1983.

(iii) The statutory provision believed to confer jurisdiction of this appeal on this Court is Title 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED - 1(f)

(a) U.S. Constitution:

(i) Amendment 14 - "...nor shall any state deprive any person of... property, without due process of law...."

(ii) Article 6(2) - "This Constitution... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

---

[2]Under KRCP 76.30(2)(c) the Opinion, thus, became final on November 23, 1983.

(b) Kentucky Statutes:

KRS 67A.875(6); KRS 67A.875(4); KRS 67A.878; KRS 67A.880; KRS 67A.881; KRS 67A.882 (See Appendix F)

STATEMENT OF MATERIAL FACTS - 1(g)

On January 10, 1980, the legislative body of the Appellee Government (the council) determined, by Ordinance that the subject wastewater collection project, consisting of 1,654 parcels of real estate, required construction.

On March 4, 1980 an Ordinance approving the Preliminary Engineering and Financing Report, as well as the Ordinance of Initiation were passed.

As required by KRS 67A.875(6) and KRS 67A.876, the Ordinance of Initiation ordered a public hearing to be held on March 31, 1980 at the Central Baptist Church in Lexington, Kentucky, at which any owner of property in the proposed project area could appear, and be heard.

Any property owner who spoke at that

hearing was limited to two minutes, could offer no evidence or witnesses, but could be heard, only as to "whether the proposed project should be undertaken, whether the nature and scope of the project should be altered, and whether the project shall be financed through the assessment of benefited properties and issuance of bonds in respect of assessments not paid on a lump sum basis...." [KRS 67A.-875(6)]. Therefore, a hearing on the appropriateness of the amount of the assessment was statutorily forbidden. In addition, only the estimated amount of the assessment was available on the date of that public hearing.

On May 29, 1980, the Ordinance of Determination (KRS 67A.879), determining that the project would be undertaken, was passed. Provision for a levy of a special benefit assessment on each property in the project area was provided for, the specific amount of each such assessment to be later determined after construction bids were solicited and accepted under KRS 67A.882.

On June 30, 1980, these Appellants,

with others, timely filed this action as a class action for declaratory and injunctive relief, challenging the proposed imposition of the special benefit assessment on their properties contending that the statute was unconstitutional, that the Government was proceeding unconstitutionally and asserting numerous issues of state law as to the invalidity of the project. Appellants contended in their Complaint that the public hearing did not rise to the level of constitutional due process as not being held at a meaningful time and under meaningful circumstances.

At the time of the filing of this action, the actual amount of the special benefit assessment with respect to each property was unknown, and unknowable.

KRS 67A.880(2) provides in pertinent part:

> "After the lapse of time as herein provided, all actions by owners of properties to be benefited shall be forever barred."

The "lapse of time" mentioned in the quote

refers to the 30-day permissive litigation period which commenced with the passage and publication of the Ordinance of Determination, a time when the actual special benefit assessment was unknown, and unknowable.

It was specifically raised in the Complaint that the public hearing did not comport with the due process requirements of the 14th Amendment to the U.S. Constitution as not being a hearing at a meaningful time, under meaningful circumstances, and that the levy of the special benefit assessment amounted to a deprivation of property without due process of law.

Beginning on January 18, 1982 a four day trial was had before the court without intervention of a jury. On August 16, 1982, the trial court rendered its Opinion (Appendix A) upholding the project, finding that the "evidence presented concerning the public hearing showed it to be in conformity with the requirements of the statute." (Appendix A, p. A4). Additionally, the trial court in the conclusions of law of its Opinion (Appendix A) concluded:

> "The public hearing held by the defendant government was in conformity with the statutes and is not violative of either the Kentucky or the United States Constitutions." (Appendix A, p. A14).

Thereafter, the original Appellants perfected their appeal to the Kentucky Court of Appeals. Pursuant to an Order of Transfer from the Kentucky Court of Appeals, the Supreme Court of Kentucky rendered its Opinion on August 31, 1983 (Appendix D), affirming the trial court in all respects. With respect to Appellants' contention that the public hearing called for in KRS 67A.875(6) did not pass constitutional muster under the due process clause, the highest court of Kentucky held:

> "The public hearing provided for affected property owners, protected their due process rights, and was constitutional. The assessment is not an unlawful taking of property in violation of the United States Constitution and the Kentucky Constitution. There is no requirement that the public hearing must be a 'trial-type' hearing.
>
> "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and manner. Matthews v. Eldridge, 424. U.S. 319, 47 L.Ed.2d 18, 96 S. Ct. 893 (1976). On March 31,

1980, a public hearing was held on this project at which several property owners spoke on the subject and on the matter of the estimated assessments. No exact figures as to the cost of the benefits were presented because final bidding had not been made. All benefited property owners were given an opportunity to speak at the public hearing as required by statute. The scheduling of the public hearing prior to the determination of exact cost to be assessed does not invalidate the meeting. If a property owner is given an opportunity to be heard at sometime during the assessment proceedings before the liability of his property is fixed, due process is satisfied. Shaw v. City of Mayfield, 204 Ky. 618, 265 S.W.13 (1924).

"The failure of the protestants to persuade a majority of the council is not a violation of due process in and of itself. The ultimate council vote was 11-4 in favor of the third-year sewer project. Clearly they had the opportunity to present their views in a constitutional framework." (Appendix D, pp. D16-D17)

On November 23, 1983 the Kentucky Supreme Court denied Appellants Petition for Rehearing (Appendix E) wherein Appellants' had again sought a declaration that KRS 67A.875(6) was unconstitutional. See KRCP 76.30(2)(c) and (f).

The Government solicited construction bids while Appellants' appeal was pending, and accepted those bids after the Opinion of the Kentucky Supreme Court was rendered upholding the project.

Property owners in the project area, including these Appellants, were thereupon notified of the exact amount of their respective assessments. These Appellants did not pay by lump sum within 30 days of such notice, and by reason thereof a lien for that assessment presently encumbers Appellants' respective properties [see KRS 67A.882(3) and (4)].

SUBSTANTIAL FEDERAL QUESTION - 1(h)

The special benefit assessment levied by the Government becomes (and did become) an encumbrance or lien upon the real property of each owner in the project area. At neither the public hearing under KRS 67A.875(6) nor during the litigation permitted by KRS 67A.880, the only two occasions when the property owners

in the project area are permitted to be "heard" are property owners afforded a hearing at a meaningful time, under meaningful circumstances on the amount of the special benefit assessment.

At the public hearing, property owners are prohibited by KRS 67A.875(6) from being heard on the amount of the special benefit assessment. Both at the time of the public hearing, as well as at the time litigation by property owners is permitted under KRS 67A.880 only the estimated amount of the assessment is known. The actual amount of the special benefit assessment is not and was not determined until the litigation below was concluded, favorable to the project, and construction bids were solicited and accepted all as provided in KRS 67A.882. At that point, the statutes (KRS 67A.871 to -.894) authorize no further hearings, and KRS 67A.880(2) specifically bars any civil action by any owner of property in the project area, which would include a prohibition against any action contesting the actual amount of the special benefit assessment.

After the litigation concluded favorably to the project at the trial court level, and while the appeal to the Supreme Court of Kentucky was pending, the Government solicited construction bids for the construction of the project. After the Opinion of the Supreme Court of Kentucky was rendered upholding the project against the contentions of these Appellants, the Government accepted the construction bids, and thereupon computed the actual special benefit assessment to be levied upon each property in the project area including the property of these Appellants. Thereupon the Government notified owners of the "exact amount" to be levied against individual properties, apprising them of their option to pay in full on a lump sum basis, within 30 days of the notice, the full amount of the special benefit assessment, or their properties would be subjected to an assessment levy, annually, to retire bonds which would be issued in an amount to cover construction costs not covered by those paying

by lump-sum, all as provided in KRS 67A.882(3).

These Appellants did not pay the lump sum amount within the 30-day period mentioned, and, therefore, their respective properties have been, and are, subject to the annual levy to retire the bond issue.

This court, in Londoner v. Denver, 210 U.S. 373, 52 L.Ed. 1103, 28 S.Ct. 708 (1907), voided a special assessment of the City and County of Denver levied upon abutting lands in connection with the cost of paving a street and discharged the lands from a lien for the assessment. At 210 U.S. 373, 378 this court held:

> "The proceedings, from the beginning up to and including the passage of the Ordinance authorizing the work did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded. Voigt v. Detroit, 184 U.S. 115; Goodrich v. Detroit, 184 U.S. 432." (Emphasis added)

The statute involved in Londoner afforded land owners an opportunity to be heard upon the validity and amount of the assessment, after the cost of the work was determined, with the council sitting as a board of equalization. The Kentucky statute involved here authorizes no such hearing. If it did, it would be constitutional, under Londoner. The statute in Londoner, however, was administered in the same manner that the Kentucky statute is written. The denial of due process in Londoner, which led to the voiding of the assessment and discharge of the lien therefor, was, that although the land owners were allowed to file complaints and objections, they were not afforded an opportunity to be heard on the amount of the assessment.

This court in Londoner at 210 U.S. 373, 385-386 reaffirmed the following rule:

> "...where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of

> the proceedings before the tax becomes irrevocably fixed, the tax payer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing." (citing cases) (Emphasis supplied).

Just as KRS 67A.880(2) denies the land owners here the right to object in the courts to the assessment when the tax becomes irrevocably fixed, this court in Londoner pointed out that the law of Colorado was to the same effect. That provision of the Colorado law had a direct bearing on this court's decision to void the assessment and discharge the lien on account of it.

Kentucky's highest court has dealt often with what the appropriate amount of a special assessment must be. The hearing to which Appellants were entitled, but denied, by KRS 67A.875(6), and by operation of KRS 67A.882 and KRS 67A.880(2), would involve principles of Kentucky law.

Book v. Trigg, 186 Ky. 664, 217 S.W. 1013 (1920) holds that special benefit assessment taxes will be upheld only if the proposed

improvements confer special benefits upon the lands assessed, but only to the extent of the value of such benefits.

Wells v. West, 228 Ky. 737, 15 S.W.2d 531 (1929) held that the Kentucky and U.S. Constitutions, as forbidding the taking of private property without just compensation, forbid the courts from enforcing any proposed special benefit assessment for a public improvement which results in spoliation (the assessment is greater than the value of the property), or when benefits to the property are less than the burdens of the assessment. To the same effect is National Cast Iron Pipe Co. v. City of Paducah, 299 Ky. 434, 185 S.W.2d 692 (1944).

> "This Constitution...shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Constitution, Article 6(2).

This Court's ruling in Londoner, that due process requires that landowners be afforded a hearing on the amount of a special assessment tax before liability for the tax is fixed, was made known to the Kentucky Supreme Court by

Appellants. Contrary to the provisions of the "supremacy clause", quoted above, the majority of the Kentucky Supreme Court ignored this court's definition of the requirements of due process under the 14th Amendment when a municipality proposes to levy a special assessment on land owners. Instead, the Kentucky Court sought refuge in Matthews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976), a wholly inappropriate authority.

At issue in Matthews was whether a social security disability benefit recipient was entitled under the due process clause to a hearing before termination of benefits, or whether the evidentiary hearing provided for by law after termination of benefits, satisfied due process. The issue here, however, is that the denial of due process complained of, is that landowners at no time are given a hearing, either before or after the levy of the assessment.

The assessment formula used by the Government established 12 zones, with arbitrary

upper and lower limits for each zone based upon a combination of road front footage, and total valuation of land and improvements,[3] as reflected by the records of the property valuation administrator. Zone I was arbitrarily assigned and estimated special assessment tax of $2,026.00, and each succeeding zone was increased by an increment of 10 percent, rising to $5,782.00 for Zone XII (See Appendix G).

The high reliability of the medical data which could lead to termination of social security disability benefits, led this court to conclude, in Matthews, that the evidentiary hearing afforded that aggrieved social security recipient after termination, satisfied due process. The arbitrary formula used by the Government (See Appendix G) is without reliability insofar as satisfying the principles of Kentucky law, as to what amount a special assessment may validly

---

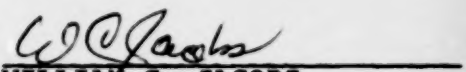
[3] KRS 67A.871(1) does not permit the use of the value of improvements, if "assessed value basis" is used, as it was used for levying the special assessment under KRS 67A.875(5).

be. Principally because landowners are given no opportunity to be heard on the actual amount of the assessment before liability is fixed (or after, for that matter) and, secondarily, because the formula used by the Government in estimating, and then ultimately, levying the assessment is without reliability in arriving at what the assessment ought to be, Matthews is no authority whatsoever for upholding the constitutionality of the statute.

The guarantee of the 14th Amendment against deprivation of property without due process is a substantial and fundamental right. That these Appellants were afforded no hearing either under the statute or as the statute was administered on the amount of the assessment is beyond dispute. The Kentucky Supreme Court refused to follow this court's explanation of what due process means, when a special assessment is sought to be levied, as set out in Londoner. In light of the supremacy clause, this Court ought to give plenary consideration of the

question presented, with briefs on the merits and oral argument, to the end that a clearly unconstitutional statute may be stricken, and the unconstitutional deprivation of Appellants' property may be remedied, by voiding the lien for the illegal special assessment.

Respectfully submitted,



WILLIAM C. JACOBS
173 North Limestone Street
Lexington, Kentucky 40507

COUNSEL FOR APPELLANTS

INDEX TO APPENDIX

FAYETTE CIRCUIT COURT
CIVIL BRANCH
THIRD DIVISION

RICHARD M. CONRAD,
ET AL. PLAINTIFFS

AUG 16 1982

VS. OPINION NO. 80-CI-1980

LEXINGTON-FAYETTE
URBAN COUNTY
GOVERNMENT, ET AL. DEFENDANTS

* * * * * * *

This case was tried before the Court without the intervention of a jury from January 18, 1982 through January 21, 1982. At the trial evidence was introduced on behalf of plaintiffs and defendants. The plaintiffs filed a complaint under the provisions of KRS 76A.880 (sic), which abated the action of the defendant government in carrying out a public improvement project which has been referred to as the Third Year Sanitary Sewer Project. It appears that the plaintiffs have followed the statutory provisions of KRS 67A.880 in filing this action. Subsequent to the trial, all parties filed "tons" of authorities and memoranda outlining their positions.

Based upon the evidence, the record, exhibits, and the voluminous memoranda, the Court makes the following findings of fact corresponding to the numerical counts in plaintiffs' complaint.

COUNT I

1. The Ordinance of Initiation and Ordinance of Determination were published on March 12, 1980 and June 3, 1980, respectively, in The Lexington Leader.

2. The Lexington Herald had the largest circulation in the publication area (Fayette County) at the times of said publications. Both newspapers are owned and published by the same corporation, The Lexington Herald-Leader Company.

3. The Lexington Leader newspaper previously had the largest circulation in the publication area and that all communications from the Lexington Herald-Leader Company to the Clerk of the Urban County Council until the filing of this lawsuit was to the effect that The Lexington Leader newspaper continued to maintain the highest circulation.

4. Widespread publicity was given to the Third Year Sewer Project via the local media and individual notices were mailed to property owners advising them of the public hearing on the property and the adoption of the Ordinance of Determination.

5. The plaintiffs made no showing that either they, or anyone else, was prejudiced by the publication of the ordinance in The Lexington Leader rather than The Lexington Herald.

COUNT II

1. KRS 67A.871 through KRS 67A.894 (Sanitary Sewer Act) is applicable only to urban-county governments and grants them an alternative authority for the construction and installation of sanitary sewer facilities.

2. At the present time, 119 of the 120 counties in Kentucky may choose the urban-county form of government.

3. An urban-county government is faced with unique situations in developing uniform community-wide sewer facilities.

4. There is only one urban-county form

of government presently adopted in the Commonwealth of Kentucky.

COUNT III AND V

1. A well-attended public hearing on the Third Year Sanitary Sewer Project was held on March 31, 1980 at the Central Captist (sic) Church. The plaintiffs presented no evidence to contradict other evidence presented that all property owners were given an opportunity to be heard at the public hearing.

2. All evidence presented concerning the public hearing showed it to be in conformity with the requirements of the statute.

COUNT IV

1. Approximately 90% of the total costs of the project are to be paid through the special assessments against the benefited properties. The other approximate 10% of the total costs were to be paid by the defendant Urban County Government and, as such, shared by all the taxpayers of Fayette County. These latter costs included trunklines, force mains, pumping stations, oversizing of certain sewer

lines, and engineering costs in respect of those items, as well as certain resident inspection costs.

COUNT VI

1. The assessment to be made against the benefited parcels is a special assessment for improvements.

2. That no "trial-type hearing" was held, nor was one provided for under the Sanitary Sewer Act.

3. The defendant Urban County Government was acting in a legislative manner in implementing the Third Year Sanitary Sewer Project.

COUNT VII

1. The plaintiffs filed this action on June 30, 1980, and within thirty (30) days after the publication of the Ordinance of Determination on June 3, 1980.

COUNTS VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVIII, XXV, XXXVI, XXXVII, XXXVIII, XL, AND XLI

1. These counts contained only issues of law and no evidence was presented to any factual questions therein.

COUNT XVII

1. The project was designed to serve, by gravity flow, ground flow, ground floor level improvements and above.

2. Some properties in the project will be provided with gravity flow sewer service to basement level improvements and the vast majority of parcels will not be provided such service.

3. The assessment procedure adopted by the defendant council and government did not make any distinction between those parcels provided with gravity flow basement service and those parcels not so provided.

COUNTS XIX AND XX

1. Ample evidence was presented to show that the Urban County Council was presented with sufficient data to make the legislative determination that the public health, safety and general welfare required construction of the Sanitary Sewer Project.

2. No evidence of fraud or illegality in the actions of the Urban County Council was produced by plaintiffs and such action was

certainly not arbitrary, nor capricious.

3. Health Department surveys of the subject areas were presented to the Council in 1975; the Council had received the views and recommendations of several specialists in the health field; and considerable discussion by the Council predated the enactment by the Council of its determination that the public health, safety and general welfare required construction of the subject Sanitary Sewer Project.

4. Additional and supplementary Health Department surveys were made and reported to the Council which ratified its actions in Ordinance No. 2-80 by ordinances adopted subsequent to the adoption of Ordinance 2-80.

COUNTS XXI AND XXXIV

The Urban County Government entered into contracts with engineers and attorneys prior to the enactment of Ordinance No. 2-80 (which determined that the public health, safety and general welfare required construction of the Sanitary Sewer Project).

COUNT XXII

1. Defendant Gordon R. Garner was and is the Commissioner of Public Works of the Defendant Lexington-Fayette Urban County Government. Mr. Garner is a duly licensed engineer in the Commonwealth of Kentucky and other states.

2. The Preliminary Engineering and Financing Report was prepared under the direction of Mr. Garner. Consulting engineers prepared cost estimates and submitted same to Mr. Garner's office upon which a portion of the Preliminary Engineering and Financing Report was prepared.

3. The Preliminary Engineering and Financing Report contains sufficient material to satisfy the requirements of KRS 67A.875 regarding the contents of said report.

COUNT XXIII

1. The $679,023.98 sum referred to in this count of the complaint is excluded from the costs that the benefited property owners must pay by special assessment.

COUNT XXIV

1. The Ordinance of Initiation sufficiently outlines the nature and scope of the Third Year Sanitary Sewer Project.

COUNTS XXVI, XXVII, XXVIII, XXIX AND XXX

1. The assessment procedure adopted by the Urban County Council provided for twelve (12) different assessment zones and therefore twelve (12) different assessments.

2. The Urban County Council was presented with sufficient data to determine that the groups of benefited properties within each of such zones were to be benefited in substantially the same manner and to substantially the same degree.

3. No evidence of inequitable assessments was presented at the trial of this matter by plaintiffs.

4. No evidence was introduced by plaintiffs of any fraud or illegality in the Council's actions.

COUNTS XXXI, XXXIII, AND XXXV

No evidence was introduced by plaintiffs to support the allegations of these counts in

the complaint.

COUNT XXXII

1. Prior Health Department approval of septic tank use on parcels in the project area were conditioned upon the parcels' connection to sanitary sewers as they became available.

2. No evidence supporting the estoppel argument of plaintiffs was presented at the trial.

AMENDED COMPLAINT

1. Ordinance No. 2-80 was given first reading on December 20, 1979, second reading and passage on January 10, 1980.

2. That there was some change of membership on the Urban County Council between the first and second reading of the above ordinance.

3. The ordinance approving the Preliminary Engineering and Financing Report was passed prior to the passage of the Ordinance of Initiation.

Based upon the foregoing findings of fact, the Court makes the following conclusions

of law:

1. Due to the widespread publicity, individual notice to property owners, publication in a newspaper of nearly equal publication, and the failure of plaintiffs to show any prejudice by the publication of the Ordinance of Initiation and Ordinance of Determination in the Lexington Leader rather than the Lexington Herald, it is concluded that the defendant government substantially complied with the publication requirements in this instance. See Queenan v. City of Louisville, Ky., 233 S.W.2d 1010 (1950) and Lime v. County of Warren, Ky., 325 S.W.2d 302 (1959).

2. KRS 67A.871 through KRS 67A.894 (Sanitary Sewer Act) is not special legislation and does not violate Sections 59 or 156 of the Constitution of Kentucky. The Sanitary Sewer Act is available for use by any of the 119 counties in Kentucky which would choose the Urban-County form of government. Although the Lexington-Fayette Urban County Government is the only Urban-County Government presently

in existence, this does not render legislation which is applicable only to that municipality unconstitutional. See City of Louisville v. Klusmeyer, Ky., 324 S.W.2d 831 (1959). It is hereby concluded that Urban-County Governments face a unique situation in providing for uniform Sanitary Sewer facilities throughout their boundaries not faced by other forms of government and that this alternative method of construction and financing Sanitary Sewer facilities is a reasonable basis for classifying the act applicable to Urban-County Governments solely.

3. This Court has recognized that where the Urban County Council acts in a legislative manner, as opposed to an adjudicatory manner, no "trial-type hearing" is required. Tackett v. Lexington-Fayette Urban County Government, Fayette Circuit Court, 76-148.

The Fayette Circuit Court has held that a public hearing, required for expansaion (sic) of urban services under the charge of the Lexington-Fayette Urban County Government, is

not required by due process to be a trial-type hearing. Davega v. Lexington-Fayette Urban County Government, Fayette Circuit Court, No. 75-1941. The Court held that expansion of service and increase of ad valorem taxes is a legislative determination in that it is of general application and the facts to be considered do not relate to a particular individual or to the status of his property. Similarly, the determination of installation of the Third Year Sanitary Sewer Project, the benfits (sic) conferred, and the assessment basis used is a determination of general application throughout the areas within the project. Due process does not require a trial-type hearing for legislative action. See City of Louisville v. McDonald, Ky., 470 S.W.2d 173 (1971).

4. The proposed assessments under the Third Year Sanitary Sewer Project are special charges levied against properties particularly benefited and as such are not subject to equal protection or uniformity requirements. See Miller v. City of Ashland,

Ky., 221 S.W.2d 620 (1949). Such special assessments are not taxes per se and are not subject to constitutional provisions governing taxes. See Robertson v. City of Danville, Ky., 291 S.W.2d 816 (1956).

5. The public hearing held by the defendant government was in conformity with the statutes and is not violative of either the Kentucky or the United States Constitutions.

6. (The allegations in this Count have been answered elsewhere.)

7. The thirty (30) day litigation period provided for in KRS 67A.880 (or fortyfive (sic) days if certain action is taken) is not an unreasonably short period of time and well within the power of the Kentucky General Assembly to enact.

8. Plaintiffs failed to sustain their burden of proof that KRS 67A.881 was unconstitutional.

9. That the proper interpretation of KRS 67A.882(3), when read in connection with KRS 67A.892, is that KRS 67A.892 is controlling, and that if by reason of miscalculation or the

happening of unforeseen events or conditions, the proceeds of the bonds authorized by the ordinance of bond authorization should prove to be insufficient to provide for the completion of the project and the payment in full of all costs thereof, the Urban-County Government shall be responsible for any such deficiency.

10. That it is within the sound discretion of the Urban County Council as to whether interest should be paid to the owners of those parcels which pay by the lump-sum method.

11. See Number 9 above.

12. Subsection (d) of KRS 67A.883 applies only to those parcels for which lump-sum payment has not been made. Subsection (a) of 67A.883 excepts properties, as to which lump-sum payment has been made, from the lien to secure the bonds.

13. KRS 67A.884 concerning liens against properties in connection with an Assistance Agreement with the Kentucky

Pollution Abatement authority does not apply to parcels which have paid by lump-sum.

14. The allegations in this Count are without merit.

15. The issuance of municipal bonds for the construction of sewer systems without a vote by the people has long been held a valid, reasonable, and nondiscriminatory exercise of a city's powers with the Constitutions of the United States and Kentucky. Davis v. Water-Sewer and Sanitation Commission of Bowling Green, 223 F. Supp. 902 (W.D. Ky., 1963) and Brown v. City of Harrodsburg, Ky., 252 S.W.2d 44, (1952).

As to liability provisions such as the one herein questioned, there is no violation of either statute or Kentucky Constitution by their inclusion in KRS 67A.886. The Kentucky Constitution's Section 157 prohibit certain forms of indebtedness without a public vote; however, a city's liability because of negligence or carelessness is not included therein. Knepfle v. City of Morehead, Ky., 192 S.W.2d 189 (1946).

16. The refund referred to in the last sentence of KRS 67A.891 refers to benefited properties which did not pay by lump-sum payment.

17. The allegations contained in Count XVII of the complaint fail to point out any invalidity of KRS 67A.893.

18. There is no showing that KRS 67A.894 is invalid in any respect.

19. As stated above, the defendant government's determination that the public health, safety, and general welfare require construction of a Sanitary Sewer System is a legislative rather than adjudicative determination and neither a trial-type hearing nor specific findings of fact are required. See Board of Levee Commissioners of Fulton County v. Johnson, Ky., 199 S.W. 8 (1917). See City of Louisville v. McDonald, Ky., 470 S.W.2d 173 (1971) for a discussion of the distinction between the legislative and adjudicative fact finding. The necessity, character and extent of a public improvement are matters within the discretion of the legislative body and courts

will not interfere with such discretion, unless it is abused. See City of Tompkinsville v. Miller, Ky., 241 S.W. 809 (1922). The burden of proof that the actions of the legislative body were erroneous, arbitrary, fraudulent or illegal, is squarely upon the party who seeks to challenge the exercise of the legislative body. See Louisville & Jefferson Co. Metropolitan Sewer Dist. v. Joseph E. Seagram & Sons, 307 Ky. 413, 211 S.W.2d 122 (1948). The plaintiffs in this case failed to sustain this burden of proof and the testimony elicited at the trial amply demonstrated the need and thorough consideration by the Council in making its determination.

20. (See Number 19 above.)

21. In Count XXI the plaintiffs contend that the contracts between the defendant government and the consulting engineering firms are invalid due to the fact that they were entered into prior to the date of the passage of Ordinance No. 2-80 which determined the need for the project. This Court concludes that KRS 67A.875(1) does not make it a mandatory

requirement that the Ordinance be passed before the contracts with the engineers. Even if this Court determined that the statute implied tha (sic) the Ordinance should be passed first, this Court concludes that such requirement is directory instead of mandatory as it does not reach the substance of the matter, and plaintiffs have failed to show any prejudice to the property owners due to any failure to observe the proper timing. Therefore, neither the contracrts (sic) nor the appropriation of funds thereto are unlawful. See Fannin v. Davis, Ky., 385 S.W.2d 321 (1964).

22. The Preliminary Engineering and Financing Report prepared under the direction of the defendant Gordon R. Garner, Commissioner of Public Works of the defendant government, satisfies the requirements of KRS 67A.875(2) and the plaintiffs failed to present any evidence showing any deficiency therein.

23. This Count in plaintiff's complaint alleges that a $679,023.98 sum should be excluded from the costs of the project paid for by the benefited parcels. The evidence clearly

showed that this sum was excluded from the costs and the Court concludes that this Count is without merit.

24. The Ordinance of Initiation sufficiently outlines the nature and scope of the Third Year Sewer Project.

25. In Count No. XXIII, the plaintiffs allege that certain language in the Ordinance of Initiation could be construed to mean that the non-lump-sum payers would pay a disproportionate share of the costs of the project. Although there had been no showing by the plaintiffs that such unequal costs are contemplated by the defendant government, this Court concludes that no such action may be taken by the defendant government. The only costs that may be added to the project after the payment by the lump-sum payers, must be costs properly allocated to the bond issue.

COUNTS 26, 27, 28, and 30

These Counts concern the assessment procedures and formula adopted and instituted by the defendant government. KRS 67A.875(5) authorizes the Urban-County Council to classify

benefited properties into one or more assessment zones should the Council determine that the benefited properties within the zones receive substantially similar benefits. The Council made such determination and since there was no showing by plaintiffs that such determination was improper, these Council actions must stand.

31. Since no evidence was presented by plaintiffs concerning the allegation of Count No. 31, this Court must conclude it was without merit.

32. The allegations in this Count are without merit.

33. The allegations in this Count by the plaintiffs are without merit as no evidence was introduced by plaintiffs in respect to it.

34. (See Number 21 above.)

35. No evidence was presented by plaintiffs with respect to this Count and therefore it is without merit.

36. These allegations are without merit.

37. The allegations in this Count are without merit.

38. (See Number 2 above.)

39. This Court has previously ruled on the issue of whether the suit should be maintained as a class action.

40. This Court denies the permanent injunction sought by plaintiffs.

41. This Count is without merit.

The Clerk is directed to make this opinion a part of the record and it shall be considered the Court's findings of fact and conclusions of law, and the attorneys of record shall prepare a proper judgment in accordance herewith.

/S/ Armand Angelucci
JUDGE ARMAND ANGELUCCI

I hereby certify that a true copy of the foregoing opinion has been mailed to Hon. William C. Jacobs, 173 North Limestone Street, Lexington, Kentucky 40507; Hon. George W. Mills, 400 Bank of Lexington, 101 East Vine Street, Lexington, Kentucky 40507; and Hon. Paul Collins, 600 Merrill Lynch Plaza, 100 East Vine Street, Lexington, Kentucky 40507 on

this the 16 day of August, 1982.

ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT

BY /S/ Wilma L. Fields, Deput

A TRUE COPY

ATTEST: ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT

BY: /S/ Wilma L. Fields DEPUTY

FAYETTE CIRCUIT COURT
CIVIL BRANCH
THIRD DIVISION

RICHARD M. CONRAD,
ET AL. PLAINTIFFS

SEP 3 1982

V. JUDGMENT NO. 80-CI-1980

LEXINGTON-FAYETTE
URBAN COUNTY
GOVERNMENT, ET AL. DEFENDANTS

* * * * * * *

This action having been tried before the Court without the intervention of a jury from January 18, 1982 through January 21, 1982 and the parties having filed memoranda in support of their respective positions, and the Court having made its Findings of Fact and Conclusions of Law with respect thereto, the same having been filed of record, and such Findings of Fact and Conclusions of Law being incorporated herein by reference,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. That KRS 67A.871 through KRS 67A.894 (Sanitary Sewer Act) is constitutional.

2. That the defendant, Lexington-Fayette Urban County Government, has complied

with the provisions of the Sanitary Sewer Act with respect to establishing the public improvement project mentioned in Plaintiff's Complaint.

3. The Sanitary Sewer Act permits the Urban-County Government to pay interest earned on lump sum payments to the owners of those parcels which paid on a lump sum basis.

4. That the Complaint and Amended Complaint of the Plaintiffs are dismissed, costs to be paid by plaintiffs.

5. That the Defendant, Lexington-Fayette Urban County Government, may proceed with the sanitary sewer project as outlined and adopted by the Urban County Council in Ordinance No. 52-80, also known as the Ordinance of Determination, which was adopted on May 29, 1980 and published on June 3, 1980 and which was filed as an exhibit in the record.

6. There being no just reason for delay and the judgment having adjudicated all the claims between the parties this is a final judgment.

/S/ Armand Angelucci
JUDGE

TO BE ENTERED IN
CONFORMITY WITH
THE RULINGS OF THE
COURT; NOTICE OF
ENTRY WAIVED

seen but has

not signed

William C. Jacobs
Attorney for Plaintiffs

HARBISON, KESSINGER, LISLE & BUSH

By /S/ George W. Mills
George W. Mills
Attorney for Defendants
Other than Lexington-Fayette
County Health Department

GREENEBAUM, DOLL & McDONALD

By /S/ Phillip D. Scott
Phillip D. Scott
Attorney for Defendant
Lexington-Fayette County
Health Department

A TRUE COPY
ATTEST: ROBERT M.
TRUE, CLERK
FAYETTE CIRCUIT
COURT

BY:/S/ C. McQuinn
DEPUTY

I hereby certify that a true copy of the foregoing order has been mailed to Hon. William C. Jacobs, 173 North Limestone Street, Lexington, Kentucky 40507 on this the ____ day of September, 1982.

ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT

BY_____,
Deputy

FAYETTE CIRCUIT COURT
CIVIL BRANCH
THIRD DIVISION

RICHARD M. CONRAD,
ET AL. PLAINTIFFS

OCT 19 1982

V. ORDER NO. 80-CI-1980

LEXINGTON-FAYETTE
URBAN COUNTY
GOVERNMENT, ET AL. DEFENDANTS

* * * * * * *

This cause came on to be heard before the Court after the filing of a motion to amend findings and a judgment under Civil Rule 52.02, said motion having been filed by the plaintiffs on September 13, 1982. Subsequent to the filing of said motion, the Court granted a hearing and had the benefit of listening to oral arguments of counsel concerning this motion.

Plaintiffs' counsel presented some seventy objections, specifically enumerating them, as to why the Court's opinion and findings should be amended, and counsel for the defendants, subsequent to said arguments, presented argument in opposition thereto.

After a review of the Court's opinion,

which was filed August 6, 1982, and the judgment entered September 3, 1982, the Court is of the same opinion and it will adopt the original findings of fact and conclusions of law.

This order therefore overrules the motion of the plaintiffs seeking to amend said findings, and adopts the judgment as entered September 3, 1982. This order shall be a final order.

The Clerk is directed to mail copies of this order to the attorneys of record.

/S/ Armand Angelucci
JUDGE ARMAND ANGELUCCI

A TRUE COPY
ATTEST: ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT

BY: /S/ Robert D. True DEPUTY

I hereby certify that a true copy of the foregoing order has been mailed to Hon. Phillip D. Scott and Hon. Paul R. Collins, 600 Merrill Lynch Plaza, P.O. Box 1808, Lexington, Ky. 40507; Hon. William C. Jacobs, 173 North Limestone Street, Lexington, Kentucky 40507; and Hon. George W. Mills, 400 Bank of Lexington, Lexington, Kentucky 40507 on this the ____ day of October, 1982.

ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT

BY _____, Deputy

SUPREME COURT OF KENTUCKY

82-SC-963-TG

RENDERED: Aug. 31, 198

RICHARD M. CONRAD, HELEN RICHARDSON, PAULA JEAN SYMPSON SMITH, RALPH J. RANSDELL, SR., HELEN M. PENA, CLIFFORD SCHLAUSKY, E.J. WAGNER and RICHARD C. COX — APPELLANTS

To Be Published

APPEAL FROM FAYETTE CIRCUIT COURT
HON. ARMAND ANGELUCCI, JUDGE
CIVIL ACTION NO. 80-CI-1980

V.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; EDGAR WALLACE, JOHN WIGGINGTON, JOE JASPER, ANNE V. GABBARD, MARY C. McNEESE, J. H. COMBS, ELEANOR H. LEONARD, FRED BROWN, WILLIAM RICE, LYMAN GINGER, PAUL ROSE, CAROL JACKSON, DONALD BLEVINS, ANN ROSS and JAMES TODD, MEMBERS OF THE LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; JAMES G. AMATO, MAYOR OF THE LEXINGTON-FAYETTE COUNTY GOVERNMENT; LEXINGTON-FAYETTE COUNTY HEALTH DEPARTMENT, GORDON R. GARNER, COMMISSIONER OF PUBLIC WORKS OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — APPELLEES

FINAL

DATE NOV 23, 1983

/S/Rose Tomlinson D.C.

OPINION OF THE COURT
BY JUSTICE WINTERSHEIMER

AFFIRMING

* * * * *

This appeal is from a judgment entered September 3, 1982, which determined that the Lexington-Fayette Urban County Government may proceed with a sanitary sewer project because it complied with the provisions of the sanitary sewer act. Various property owners sought declaratory and injunctive relief challenging the proposed imposition of the special sewer assessment as unconstitutional.

The principal question presented is whether KRS 67A.871 is special legislation and therefore unconstitutional. Other issues raised are whether the government was required to strictly comply with the publication statutes, whether the council was required to set out adjudicative facts in support of the ordinance of initiation, whether the improvement benefit assessment formula was constitutional, and whether it was properly based on assessed value pursuant to statute, whether the government complied with the due process hearing requirements in connection with the public hearing, whether the government failed to comply with the actual notice

requirements of the act in relation to the public hearing, whether the 30-day litigation period is unreasonable because it accrues before the actual cost of the project is known, whether the outside contracts entered into by the government with engineering and legal firms are void, whether the circuit court properly refused to allow this action to be maintained as a class action, and whether it was error to refuse to enjoin the project from proceeding.

This Court affirms the judgment of the circuit court because the statute is constitutional and the method of assessment valid.

The General Assembly was within its constitutional authority to provide authorization for urban county governments to construct and maintain waste water collection projects. Such authority is merely a logical extension of the legitimate power of any municipal government.

The project in question is known as the "third-year sewer project" and encompasses eight neighborhoods in Lexington-Fayette

County, involving 1,657 parcels of property. In the original complaint, the appellants alleged 41 counts. On appeal, they present twelve arguments. A four-day trial was conducted beginning January 18, 1982, before the circuit judge without a jury. The evidence consisted principally of each property owner testifying and most of the city council members as well as various government engineers and employees, the Commissioner of Health and a real estate appraiser. The government presented proof in support of their decision to establish the sewer project, and the property owners testified that they did not want, nor believe that they really needed sewers. Judgment was entered on September 3, 1982, and the appeal of the property owners was transferred to this Court on March 30, 1983.

The Urban County Government statute, KRS 67A.871 through 67A.894, is not special legislation and does not violate Section 59 or Section 60 or Section 156 of the Kentucky Constitution. The classification of urban county government by the legislature has been

found to be a reasonable classification. Holsclaw v. Stephens, Ky., 507 S.W.2d 462 (1974). The fact that there is presently only one urban county government does not mean that the law is unconstitutional. City of Louisville v. Klusmeyer, Ky., 324 S.W.2d 831 (1959). The Urban County Sewer Act is an appropriate classification and bears a reasonable relation to the purpose of the act. Such a government is authorized to plan, develop, initiate and finance waste water collection projects. KRS 67A.872. The testimony of a former mayor explains the purpose of the act and provides a basis for the finding by the circuit judge. Where a merged government is established, it is necessary to have an equitable means of extending sanitary sewers to older neighborhoods in former county areas. The act created a reasonable method of extending sewers and fairly assessing the costs of construction.

The appellants' argument that the act does not cover second-class cities with sewage problems is unconvincing. Those cities do not

present the same situation as an urban county government because the areas of their jurisdiction do not encompass unsewered county territory. The act cannot be considered special legislation because the classification is not as broad as it could have been drawn. Commonwealth, ex rel Hancock v. Davis, Ky., 521 S.W.2d 823 (1975).

United Dry Forces v. Lewis, Ky., 619 S.W.2d 489 (1981), is distinguishable because the court found that a statutory proceeding authorizing wet/dry elections did not refer to the stated purpose of the statute and therefore did not reasonably relate to its purpose. Here, the law did relate to the legislative purpose of the act. Even considering United Dry Forces, supra, the act is not special legislation.

Additionally, legislative action is generally presumed to be constitutional. Holzclaw (sic) v. Stephens, supra. Folks v. Barren County, Ky., 313 Ky. 515, 232 S.W.2d 1010 (1950). At trial, there was no evidence or substantial argument to overcome the presumption

of constitutionality which must be accorded the act. Here there is a reasonable relation between the classification or urban county government and the purpose of the act. The circuit court is affirmed.

The failure of the government with regard to KRS 424.120(1)(B), is not reversible error. There was compliance with the law requiring publication. The circuit court determined that publication in the Lexington Leader, which is owned and published by the same corporation that owns and publishes the Lexington Herald, was sufficient. Actually the Herald has a larger circulation than the Leader. The Court determined that the project received widespread publicity. All communication to the government's clerk had indicated that the Leader had the largest circulation. Furthermore, individual notices were mailed to the property owners advising them of the public hearing. There was no showing of any prejudice as a result of the erroreous (sic) selection of a newspaper.

The government believed that the Leader

was the newspaper with the largest bona fide circulation because the previous written and oral communications from the publishing company had so indicated. In addition, the employee of the Lexington-Herald Leader company in charge of advising customers as to circulation figures for the purpose of running legal notices assumed the Leader to be the proper newspaper in which to publish legal notices. Prior to this lawsuit, all legal notices of the Board of Education, Lex Tran, Board of Health, airport board and the planning commission were published in the Leader. The Leader did have the highest circulation until after March 1977. It was not until September 1980, that the government was informed of the change in circulation leadership.

Substantial compliance in regard to publication requirements has been authorized in Queenan v. City of Louisville, Ky., 233 S.W.2d 1010 (1950). The purpose of the statute is to allow the public an ample opportunity to become sufficiently informed

on the public question involved. Substantial compliance was also affirmed in Lyon v. County of Warren, Ky., 325 S.W.2d 302 (1959). There the court considered the widespread publicity relating to the bond issue and a large voter turnout. Here there was considerable publicity about the initiation of the sewer project by means of radio, television as well as newspaper coverage. Consequently, the purpose of the statutory requirements of notification by publication was achieved. The trial judge was correct in determining that substantial compliance had been achieved.

It should be noted that the appellants in raising the question of inadequate notification are the very persons who have initiated the lawsuit, indicating that they were not denied notification. The appellant's contention that failure to strictly comply with the requirements of publication is a jurisdictional defect which would render the ordinance invalid is not persuasive. The various authorities cited do not convince us that the true purpose of the statute was not achieved by substantial

compliance. KRS 67A.880 provides that the date of publication of the ordinance of determination begins the 30-day litigation period. The ordinance in question was adopted on May 29, 1980, and published on June 3, 1980. There is no indication that anyone was prejudiced by the substantial compliance with the publication requirements.

There was a proper finding by the council. A municipal legislative body which provides for the construction of public improvements is performing a legislative act. Here the council adopted a program for the construction of sewers that was generally applicable throughout four project areas. It acted in a law-making and policy-making role. It was not acting adjudicatively. The appellants cite no authority to support their proposition that a legislative decision to construct public improvements can be characterized as an adjudicative function.

The legislative action of any governing body is subject to very limited judicial review. The legislature is not governed by judicial

compliance. KRS 67A.880 provides that the date of publication of the ordinance of determination begins the 30-day litigation period. The ordinance in question was adopted on May 29, 1980, and published on June 3, 1980. There is no indication that anyone was prejudiced by the substantial compliance with the publication requirements.

There was a proper finding by the council. A municipal legislative body which provides for the construction of public improvements is performing a legislative act. Here the council adopted a program for the construction of sewers that was generally applicable throughout four project areas. It acted in a law-making and policy-making role. It was not acting adjudicatively. The appellants cite no authority to support their proposition that a legislative decision to construct public improvements can be characterized as an adjudicative function.

The legislative action of any governing body is subject to very limited judicial review. The legislature is not governed by judicial

standards in making findings of fact. McKinstry v. Wells, Ky. App., 548 S.W.2d 169 (1977). The legislature cannot be arbitrary or capricious. The construction of public improvements will not be disturbed unless there is an abuse of discretion or a showing of fraud or illegality. City of Tompkinsville v. Miller, 195 Ky. 143, 241 S.W. 809 (1922); Thomas v. City of Berea, Ky. App., 557 S.W.2d 214 (1977). Here the record amply demonstrates that the council made sufficient findings based on substantial information that the public health, safety and welfare required building the sanitary sewers. There is a well established rule of noninterference by the judiciary with the exercise of discretionary powers of municipal corporations. McQuillin, Municipal Corporations §10.37 (3rd Ed. Rev. 1979). "Courts are reluctant to and only in extreme cases will declare ordinances passed pursuant to legislative authority invalid on the ground that they are unreasonable, arbitrary or oppressive." City of Somerset v. Newton,

259 Ky. 195, 198, 82 S.W.2d 306 (1935).

The improvement benefit assessment formula was proper as used by the council. The appellants argue that neither the statute nor the assessment formula is constitutional because neither accounts for actual value conferred on individual property. A careful examination of the record indicates that there was no showing that the determination by the council was improper. Pursuant to the statutes the council adopted an improvement benefit assessment formula based on findings of fact that the benefited properties received substantially similar benefits.

Again the appropriate standard of review for legislative action is limited to whether the act in question is unreasonable or arbitrary. Moore v. Ward, Ky., 377 S.W.2d 881 (1964). Here there is a rational connection between the action and the purpose for which the government's power existed. The government's decision as to the benefits conferred upon the properties in the third-year

project and the improvement benefit assessments to be levied is supported by the various investigations, studies and other related information. There is no evidence in the record which indicates the properties would not be enhanced as a result of the new sewers.

It is well settled that a special assessment for public sewer improvements is not a "tax" but is an assessment which is to be made in an amount with reference to the benefit which the property derives from the cost of the project. Krumpelman v. Louisville & Jefferson County Sewer District, Ky., 314 S.W.2d 557 (1958). KRS 67A.873 provides that waste water collection projects may be assessed according to the assessed value basis. There is no basis for contending that the legislative action by city government is arbitrary because there is a rational connection between that action and the purpose for which the government was created. McDonald v. City of Louisville, Ky., 470 S.W.2d 173 (1971).

A municipal legislative judgment in relation to a public improvement project will be overturned only where it is shown that the action is so arbitrary and unwarranted as to result in confiscation. United States v. Carolene Products Co., 304 U.S. 144, 82 L.Ed. 1235, 58 S.Ct. 778 (1938).

The burden is on the person who challenges the action of the legislative body as being unreasonable and arbitrary to sustain that position where it does not appear on the face of the ordinance. Louisville & Jefferson County Metropolitan Sewer District v. Joseph E. Seagram & Sons, 307 Ky. 413, 211 S.W.2d 122 (1948). The record here does not indicate that the appellants have sustained their burden of proof. Balancing the arguments of the appellants and the appellees, it appears that the government made a significant effort to support its decision. The trial court was correct in its decision.

There was substantial evidence that the government's determination as to the appropriate assessment formula was proper

under KRS 67A.875(5). The appellants provided no evidence that the formula was improper either under the statute or as applied to their properties. The trial court's finding was correct.

When the council determines that all benefited properties will be affected in substantially the same way, the council may classify the properties into assessment zones based on similarity of benefits. This section of the law was the foundation of the assessment procedure used by the counsel (sic). There was testimony by various counsel (sic) members and the health commissioner that considerable study had gone into the adoption of the formula. The trial court found that the assessment procedure provided for twelve different zones and twelve different assessments. He also determined that there was sufficient data to determine that the benefited properties received substantially equal benefits and that no evidence of inequality was presented at trial as well as no evidence of fraud or illegality in the council's action.

Again judicial review of legislative action in arriving at improvement assessment formulas is very limited. The courts will interfere only where there is an abuse of discretion. City of Tompkinsville v. Miller, supra. We find no reason to disturb the findings of fact as made by the trial court.

The public hearing provided for affected property owners, protected their due process rights, and was constitutional. The assessment is not an unlawful taking of property in violation of the United States Constitution and the Kentucky Constitution. There is no requirement that the public hearing must be a "trial-type" hearing.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and manner. Matthews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976). On March 31, 1980, a public hearing was held on this project at which several property owners spoke on the subject and on the matter of the estimated assessments. No exact figures as to the cost of the benefits

were presented because final bidding had not been made. All benefited property owners were given an opportunity to speak at the public hearing as required by statute. The scheduling of the public hearing prior to the determination of exact cost to be assessed does not invalidate the meeting. If a property owner is given an opportunity to be heard at sometime during the assessment proceedings before the liability of his property is fixed, due process is satisfied. Shaw v. City of Mayfield, 204 Ky. 618, 265 S.W. 13 (1924).

The failure of the protestants to persuade a majority of the council is not a violation of due process in and of itself. The ultimate council vote was 11-4 in favor of the third-year sewer project. Clearly they had the opportunity to present their views in a constitutional framework.

The contention that the improvement is a tax and therefore a trial-type hearing is necessary is without merit. The improvement benefit assessment is a special assessment

as distinguished from a tax. Krumpelman, supra. The improvement benefits assessment is based on the relationship to benefits conferred. Here the legislative body acted to investigate legislative facts and no trial-type hearing was required. The municipal legislative body did not act in an adjudicatory manner. A general program applicable to properties throughout the project area was established. The property of the appellants was not treated individually based on facts peculiar to each situation. There is no indication that the action of the council was arbitrary or that there was an absence of a rational connection between the action and the purpose of the act. The landowners did have an opportunity at a public hearing to be heard. The council's actions were lawful.

Council complied with the notice requirements of the act in connection with the public hearing. The trial judge correctly found that the mailing of individual notices to the property owners based on the

records of the property valuation administration office was the most practicable method under the circumstances to give reasonable actual notice. There is no showing that the appellants were prejudiced by the method of notice used. Accordingly, the publication requirements were satisfied.

The 30-day statute of limitations is constitutional and within the power of the General Assembly to enact. The statute provides that the landowner must file a civil action within 30 days of the publication of the ordinance of determination. Here the appellant's (sic) timely filed this lawsuit. The trial court was correct in holding that the 30-day litigation period is not an unreasonably short period of time and within the authority of the legislature to enact.

The so-called outside contracts entered into by the government with engineering and law firms were legal and validly executed. The appellants argue the statute mandates engineering contracts be entered into only after the ordinance is passed. There is no mandatory

requirement in KRS 67A.875 that the engineering contracts be authorized after the ordinance is passed. Any language requiring the engineering work to be done after the passage of the ordinance is directory and not mandatory. A statute is considered as directory if it relates to some immaterial matter of it is does not reach the substance of the thing, and if by the omission to observe it, the rights of those interested will not be prejudiced. Fannin v. Davis, Ky., 385 S.W.2d 321 (1964). The substance of the law is that in conjunction with initiating a waste-water collection project, the government is authorized to contract for preliminary plans, specifications and financial planning. An informed council decision to undertake this kind of project requires substantial preliminary information with regard to the area to be served and the related costs. The statute contains no mandatory language that consultants shall be retained only after the ordinance determining the need is passed. The evidence does not indicate any prejudice resulting from the

timing of the execution of the engineering contracts. Neither the contracts, nor the appropriation of funds therefor, was unlawful. In addition, the statute specifically permits the use of firms of engineers without regard to whether the government has its own staff engineers. Such costs are specifically included in the project and passed on to the property owners. KRS 67A.871(5) and 67A.882(2).

In regard to the outside attorney fees, the urban county government has authority to retain outside counsel for independent projects. A similar charter provision was endorsed in Purcell v. City of Lexington, 186 Ky. 381, 217 S.W. 599 (1920). In the absence of a specific statutory prohibition, a municipal corporation is generally permitted to contract with outside counsel. 56 Am. Jur. 2d Municipal Corporations Etc. § 219. Heninger v. City of Akron, Ohio, 112 N.E.2d 77 (1951); Moore v. City of Kokomo, Ind., 60 N.E.2d 530 (1945). The Lexington-Fayette Urban County Government charter provides that private counsel may be retained. Section 3.02 permits the government

to enter contracts with private persons with regard to the furnishing of services.

The circuit court correctly refused to allow this matter to be maintained as a class action. On October 14, 1980, an order was entered indicating that the government had requested a hearing on the class action aspects. Such a hearing was scheduled for November 14, 1980. The record does not indicate that evidence was introduced by the appellants to support their request. The trial court did not proceed as a class action but allowed the appellants to reapply for certification. This was not done.

The contention that the council did not study and evaluate the preliminary engineering and financing report is without merit. The evidence shows that the government did discuss and review the various reports at great length. There was no error of reversible consequence in the trial court's refusing to enjoin the project from proceeding.

It is the holding of this Court that the imposition of the special assessment for the

sanitary sewer project is valid and constitutional.

The judgment of the circuit court is affirmed.

Aker, Gant, Leibson, Stephenson and Wintersheimer, JJ., concur. Vance, J., dissents. Stephens, C.J., not sitting.

ATTORNEY FOR APPELLANTS:

William C. Jacobs
Wilson, Jacobs & Wilson
173 North Limestone Street
Lexington, Kentucky 40507

ATTORNEYS FOR APPELLEES:

Barbara B. Edelman
Rena G. Wiseman
Lexington-Fayette Urban Co. Govt.
Department of Law
200 East Main Street
Lexington, Kentucky 40507

Phillip D. Scott
Kathleen A. McDonough
Greenebaum Doll & McDonald
1400 Vine Center Tower
P.O. Box 1808
Lexington, Kentucky 40593
Counsel for Health Department

SUPREME COURT OF KENTUCKY

82-SC-963-TG

RICHARD M. CONRAD,
ET AL. PLAINTIFFS

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ARMAND ANGELUCCI, JUDGE
INDICTMENT NO. - 80-CI-1980

LEXINGTON-FAYETTE
URBAN COUNTY
GOVERNMENT, ET AL. DEFENDANTS

ORDER DENYING PETITION FOR REHEARING

Appellants' petition for rehearing is denied.

Aker, Gant, Leibson, Stephenson, Vance and Wintersheimer, JJ., sitting. All concur.

ENTERED November 23, 1983.

/S/ Robert F. Stephens
Chief Justice

KRS 67A.875. Determination of need by ordinance--Preliminary planning procedures--Ordinance of initiation.

"KRS 67A.875(6) The ordinance of initiation shall provide that a public hearing shall be held in respect of the proposed project at a time and place which shall be specified in the ordinance of initiation, and shall give notice that at the public hearing any owner of benefited property may appear and be heard as to whether the proposed project should be undertaken, whether the nature and scope of the project should be altered, and whether the project shall be financed through the assessment of benefited properties and issuance of bonds in respect of assessments not paid on a lump sum basis all as proposed by the ordinance of initiation and as authorized by KRS 67A.871 to 67A.894."

"KRS 67A.875(4) In all succeeding proceedings, the government shall be bound and limited by the ordinance of initiation with regard to the nature, scope and extent of the proposed wastewater collection project, but shall not be bound by or limited to the preliminary estimate of the costs of the proposed project. The costs of such project shall be determined upon the basis of construction bids publicly solicited by such urban-county government as required by KRS 67A.871 to 67A.894, and shall be binding upon the government and upon the owners of benefited properties, whether they turn out to be equal to, below, or above, such preliminary estimate of costs."

"KRS 67A.878. Public hearing.--A public hearing shall be held at the time and place designated in the ordinance of initiation. Any person qualifying under the provisions of KRS 67A.875(7) shall preside and conduct the hearing. The presiding officer shall cause reasonable notes or minutes of the proceedings to be made, and they shall be submitted in

writing to a subsequent regularly scheduled meeting of the urban-county council of the government. Any owner of property proposed to be benefited by the proposed wastewater collection project may appear and be heard at the public hearing either in person or by a duly authorized representative. Any such owner of benefited property may submit to the presiding officer or to the designated clerk a written instrument in which such owner of benefited property is identified by name, address and designation of benefited property, and containing a statement of any reason for advocating or objecting to any of the aspects of the proposed project, and such written instruments shall be attached to and included in the written report of the hearing. Whether or not any such written instruments are submitted, the presiding officer at the public hearing may require those in attendance to execute an attendance roster, to properly identify themselves as owners of benefited property or representatives of the owners, and may impose reasonable rules upon the conduct of the public hearing. The estimated costs of the project shall be disclosed at the public hearing, or, if construction bids for construction of the project have been received, the results of the bidding shall be disclosed. A report of local health agencies may be made a part of the public hearing, and the government may cause distribution of informative materials and summarizations of engineering and health reports to be carried out at the public hearing. The public hearing may be adjourned to convene again, and from time to time either at a time and place announced at the public hearing or upon public notice of the time and place to be given in any manner the government may determine."

"KRS 67A.880. Action by property owner for relief from ordinance or determination.--(1) Any owner of property to be benefited by the wastewater collection project may, within thirty (30) days after passage and

publication of the ordinance of determination:

(a) File an action in the circuit court of the county in which the urban-county government is situated seeking relief by declaratory judgment, injunction or otherwise; or

(b) File in the office of the clerk of the urban-county government a written statement of intent to file such an action endorsed by a licensed attorney at law to the effect that in his opinion his client has a reasonable and legitimate probable cause for such proposed litigation, in which event the time for filing the action shall be extended for fifteen (15) days after the date the statement is filed.

(2) In the event of the occurrence of either (a) or (b) above, all proceedings of the government with respect to the proposed wastewater collection project shall be abated until final judicial determination of the controversies presented thereby. In the absence of action by any owner of property proposed to be benefited as herein provided, the provisions of the ordinance of determination shall be final and binding. After the lapse of time as herein provided, all actions by owners of properties to be benefited shall be forever barred."

"KRS 67A.881. Action by council when ordinance of determination upheld.--If the ordinance of determination authorizes the undertaking of the project and the financing thereof according to the plan of financing enacted by the ordinance of initiation, and if owners of benefited properties do not institute action as permitted by KRS 67A.880, or if such action be taken and shall result in final judgment permitting the government to proceed according to the ordinance of initiation and the ordinance of determination, the urban-county council of the government may proceed to implement and finance the costs of construction of the project as authorized by KRS 67A.871 to 67A.894."

"KRS 67A.882. Bids--Apportionment of cost--Alternative payment methods and funding.--(1) Proposals for the construction of the project shall be solicited upon the basis of submission of sealed, competitive bids after advertisement by publication pursuant to KRS Chapter 424, following adoption of the ordinance of determination and expiration of the permissive litigation period, or alternatively, the conclusion of litigation in a manner favorable to the project.

(2) After all costs of the project have been determined upon the basis of the construction bidding, the costs shall be apportioned among the owners of benefited property pursuant to the method of assessment previously determined in the ordinance of initiation and the ordinance of determination. However, in determining the apportionment of individual costs for purposes of affording to the owners of benefited property the privilege of paying the assessment levies in full on a lump sum basis, the urban-county government shall exclude amounts required for the creation of the debt service reserve fund, capitalized interest costs, and any bond discount which the government may allow in connection with the sale of bonds to provide funds for the costs of construction not paid initially by the owners of benefited properties on a lump sum basis.

(3) The owners of benefited property shall be notified in writing of the exact amount levied against their individual properties, which amount may, at the option of each owner, be paid in full on a lump sum basis within thirty (30) days. Such owners shall be notified that in the event the costs of construction of the project exceed lump sum payments and bond proceeds, an additional apportionment of costs will be made and that all owners who paid the initial improvement benefit assessment on a lump sum basis must likewise pay the additional assessment on the same basis. The statement submitted to such owners of benefited property shall additionally

advise such owners that in the event such owners do not elect to pay the special improvement benefit assessment in full within the period of thirty (30) days from receipt, the urban-county government shall issue bonds pursuant to KRS 67A.871 to 67A.894 for the purpose of providing the cost of construction of the project, including the debt service reserve fund, if paid from bond proceeds, capitalized interest costs, any bond discount, together with all other costs, as the term is defined in KRS 67A.871(5). The owners of the benefited property shall further be advised that bonds and the interest thereon shall be amortized by annual improvement benefit assessment levies against all benefited properties which have not made lump sum payments in accordance with the method of apportionment provided by the ordinance of initiation and the ordinance of determination.

(4) At the conclusion of the thirty (30) day permissive lump sum payment period, the urban-county council shall determine the aggregate principal amount of improvement benefit assessments paid in full by owners of benefited property; shall order the deposit of the moneys in a trust account which shall be used solely to pay the costs of construction of the project; shall aggregate all unpaid improvement benefit assessments for purposes of determining the principal amount of bonds to be issued by the government to provide the costs of the project; shall compute the debt service reserve fund in respect to the bonds, if the fund is to be capitalized from bond proceeds; shall determine the bond discount and capitalized interest which shall be applicable to the issue of bonds; and shall proceed to complete the financing of the costs of construction of the project through the adoption of the ordinance of bond authorization as provided in KRS 67A.883 and the sale of bonds authorized pursuant thereto. Provided, however, that the ordinance of bond authorization may, as provided in KRS 67A.884, provide that, in lieu of issuing bonds, the government may contract with the Kentucky pollution abatement authority for the financing of the project, in which latter event all procedures with respect

to the annual assessment of benefited properties shall continue in full force and effect, but the urban-county government shall secure funding for the project through the Kentucky pollution abatement authority in lieu of issuing bonds and shall pledge to and pay to the authority the annual improvement benefit assessment levies and enforce them for the security of the financing.

ESTIMATED BENEFIT ASSESSMENT BY ZONE AND
FORMULA USED BY LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT
TO ASSIGN PROPERTIES TO ZONES

ASSESSMENT ZONE	ESTIMATED SPECIAL BENEFIT ASSESSMENT	FRONT FOOTAGE	PVA ASSESSED VALUATIO
I	$2,026	0 to 30 ft.	0 to $10,0
II	$2,229	30+ to 40 ft.	$10,000+ to $15,0
III	$2,452	40+ to 50 ft.	$15,000+ to $20,0
IV	$2,697	50+ to 65 ft.	$20,000+ to $25,0
V	$2,967	65+ to 80 ft.	$25,000+ to $30,0
VI	$3,264	80+ to 95 ft.	$30,000+ to $35,0
VII	$3,590	95+ to 110 ft.	$35,000+ to $40,0
VIII	$3,949	110+ to 140 ft.	$40,000+ to $50,0
IX	$4,344	140+ to 170 ft.	$50,000+ to $60,0
X	$4,778	170+ to 260 ft.	$60,000+ to $90,0
XI	$5,256	260+ to 350 ft.	$90,000+ to $120,0
XII	$5,782	over 350 ft.	over $120,000

IN THE SUPREME COURT OF THE
COMMONWEALTH OF KENTUCKY

RICHARD M. CONRAD, HELEN RICHARDSON, PAULA JEAN SYMPSON SMITH, RALPH J. RANSDELL, SR., HELEN M. PENA, CLIFFORD SCHLAUSKY, E. J. WAGNER and RICHARD C. COX — APPELLANTS

FILED: December 12, 1983

V.

NOTICE OF APPEAL UNDER RULE 10 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

NO. 82-SC-963-TG

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; EDGAR WALLACE, JOHN WIGGINGTON, JOE JASPER, ANNE V. GABBARD, MARY C. McNEESE, J. H. COMBS, ELEANOR H. LEONARD, FRED BROWN, WILLIAM RICE, LAYMAN GINGER, PAUL ROSE, CAROL JACKSON, DONALD BLEVINS, ANN ROSS and JAMES TODD, MEMBERS OF THE LEXINGTON-FAYETTE URBAN COUNTY COUNCIL; JAMES G. AMATO, MAYOR OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT; LEXINGTON-FAYETTE COUNTY HEALTH DEPARTMENT, GORDON R. GARNER, COMMISSIONER OF PUBLIC WORKS OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — APPELLEES

* * * * * * * * *

Notice is hereby given that Richard C. Cox, Ralph J. Ransdell, Sr. and Paula Jean Sympson Smith, three of the Appellants named above, hereby appeal to the Supreme Court of

the United States from the Final Judgment of the Supreme Court of Kentucky by the Opinion rendered August 31, 1983, and by Order denying Appellants' timely filed Petition for Rehearing, entered November 23, 1983, upholding the judgment of the Fayette Circuit Court, which upheld the validity of a state statute, to wit: KRS 67A.871 to 67A.894, particularly, but not limited to KRS 67A.875(4), 67A.875(6), KRS 67A.878 and KRS 67A.882, the validity of such statute having been drawn in question as being repugnant to the due process clause of the 14th Amendment to the Constitution of the United States of America, and such judgment here appealed from being in favor of validity.

This appeal is taken pursuant to Title 28 U.S.C. §1257(2); 28 U.S.C. §2101(c); and 28 U.S.C. §2403(b).

/S/ W. C. Jacobs
WILLIAM C. JACOBS
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2464

ATTORNEY FOR APPELLANTS

PROOF OF SERVICE

I, William C. Jacobs, a member of the Bar of the Supreme Court of the United States of America and attorney of record for Richard C. Cox, Ralph J. Ransdell, Sr., and Paula Jean Sympson Smith, Appellants herein, certify that on the 9th day of December, 1983 I served true copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the Appellees, Lexington-Fayette Urban County Government; Edgar Wallace, John Wiggington, Joe Jasper, Anne V. Gabbard, Mary C. McNeese, J. H. Combs, Eleanor H. Leonard, Fred Brown, William Rice, Lyman Ginger, Paul Rose, Carol Jackson, Donald Blevins, Ann Ross and James Todd, Members of the Lexington-Fayette Urban County Council; James G. Amato, Mayor of the Lexington-Fayette Urban County Government; Lexington-Fayette County Health Department; Gordon R. Garner, Commissioner of Public Works of the Lexington-Fayette Urban County Government, by causing true copies thereof to be deposited in a United States post office, at Lexington, Kentucky,

with first-class postage prepaid, addressed to the respective counsels of record for such Appellees, at their respective post office addresses of such counsel, as hereinafter set forth, to wit: for Appellees Lexington-Fayette Urban County Government; Edgar Wallace, John Wiggington, Joe Jasper, Anne V. Gabbard, Mary C. McNeese, J. H. Combs, Eleanor H. Leonard, Fred Brown, William Rice, Lyman Ginger, Paul Rose, Carol Jackson, Donald Blevins, Ann Ross and James Todd, Members of the Lexington-Fayette Urban County Council; James G. Amato, Mayor of the Lexington-Fayette Urban County Government; and Gordon R. Garner, Commissioner of Public Works of the Lexington-Fayette Urban County Government by mailing same to their attorneys of record, Hon. Rena Gardner Wiseman and Hon. Barbara B. Edelman, Lexington-Fayette Urban County Government, Law Department, 200 East Main Street, Lexington, Kentucky 40507; for Appellee Lexington-Fayette County Health Department, by mailing same to its attorney of record, Hon. Phillip D. Scott,

Greenebaum, Doll & McDonald, P.O. Box 1808, Lexington, Kentucky 40503.

This Notice of Appeal is with respect to a proceeding wherein the constitutionality of a statute of a State, to wit: the Commonwealth of Kentucky, is drawn in question, and neither the State nor any agency, officer or employee thereof is a party hereto, that 28 U.S.C. §2403(b) may be applicable, and that by reason thereof a true copy hereof was served upon the Attorney General of the Commonwealth of Kentucky on the 9th day of December, 1983 by causing a true copy thereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid to wit: Hon. Steven L. Beshear, Attorney General, State Capitol, Frankfort, Kentucky 40601.

During the pendency of this proceeding at the trial level before the Fayette Circuit Court, Lexington, Kentucky, it was certified to the Attorney General for the Commonwealth of Kentucky on the 19th day of September, 1980 that the constitutionality of the statute of

the Commonwealth of Kentucky mentioned in the within Notice of Appeal was drawn in question and that on the 7th day of October, 1980 the Attorney General of the Commonwealth of Kentucky filed herein his notice of intention not to intervene.

The undersigned certifies that a true copy of the within Notice of Appeal to the Supreme Court of the United States was served upon the clerk of the Fayette Circuit Court, such clerk being the clerk of the court possessed of the record herein, by causing a true copy thereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid to wit: Robert M. True, Clerk, Fayette Circuit Court, Room 200, Courthouse, Lexington, Kentucky 40507.

The undersigned attorney for the Appellants (Richard C. Cox, Ralph J. Ransdell, Sr. and Paula Jean Sympson Smith) believes that the Appellants Richard M. Conrad, Helen Richardson, Helen M. Pena, Clifford Schlausky and E. J. Wagner have no interest in the outcome of this appeal. This is to certify that a true

copy hereof was served on Richard M. Conrad, c/o Conrad Chevrolet, Inc., 2800 Richmond Road, Lexington, Kentucky 40509, Helen Richardson, 616 North Addison Avenue, Lexington, Kentucky 40504, Helen M. Pena, 613 North Addison Avenue, Lexington, Kentucky 40504, Clifford Schlausky, 216 Zandale Drive, Lexington, Kentucky 40503, and E. J. Wagner, 3016 Shirlee Drive, Lexington, Kentucky 40502, by mailing same to the Appellants' respective post office addresses mentioned above by causing a true copy thereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid.

The undersigned states that all parties required to be served are the parties named above, accompanied by the addresses of their respective counsel, and that all such parties have been served, as herein certified.

By affixing his signature hereto, the undersigned does thereby enter his appearance as attorney for Appellants herein.

/S/ W. C. Jacobs

WILLIAM C. JACOBS
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2464

ATTORNEY FOR APPELLANTS

The foregoing Appendices are filed by Counsel, identified below, for the Appellants in conformity with Rule 15.1(j) and Rule 33.6 of the Rules of the Supreme Court.

William C. Jacobs
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2464

ENTRY OF APPEARANCE AND
PROOF OF SERVICE

I, William C. Jacobs, a member of the Bar of the Supreme Court of the United States of America, enter an appearance as attorney of record for the Appellants herein, Richard C. Cox, Ralph J. Ransdell, Sr., and Paula Jean Sympson Smith and certify on the 8th day of February, 1984 I served three (3) copies of the foregoing Jurisdictional Statement and Appendices by causing true copies hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed to the respective counsels of record for such Appellees, at their respective post office addresses of such counsel, as hereinafter set forth, to wit: for Appellees Lexington-Fayette Urban County Government; Edgar Wallace, John Wiggington, Joe Jasper, Anne V. Gabbard, Mary C. McNeese, J. H. Combs, Eleanor H. Leonard, Fred Brown, William Rice, Lyman Ginger, Paul Rose, Carol Jackson, Donald Blevins, Ann Ross and James Todd, Members of

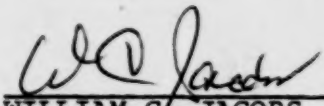
the Lexington-Fayette Urban County Council; James G. Amato, Mayor of the Lexington-Fayette Urban County Government; and Gordon R. Garner, Commissioner of Public Works of the Lexington-Fayette Urban County Government by mailing same to their attorneys of record, Hon. Rena Gardner Wiseman and Hon. Barbara B. Edelman, Lexington-Fayette Urban County Government, Law Department, 200 East Main Street, Lexington, Kentucky 40507; for Appellee Lexington-Fayette County Health Department, by mailing same to its attorney of record, Hon. Phillip D. Scott, Greenebaum, Doll & McDonald, P.O. Box 1808, Lexington, Kentucky 40503.

That on the 29th day of December, 1983, the Attorney General of the Commonwealth of Kentucky, by counsel, served his NOTICE OF INTENT NOT TO INTERVENE, acknowledging receipt of the Notice of Appeal under Rule 10 of the Rules of the Supreme Court of the United States filed by Appellants in the Supreme Court of Kentucky, informing the Court and the parties that the Attorney General did not intend to intervene.

The undersigned further certifies that a true copy hereof was served upon the Clerk of the Supreme Court of Kentucky, such clerk being the clerk of the court whose judgment is sought to be reviewed by causing a true copy hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed as follows to wit: Clerk, Kentucky Supreme Court, Room 209, Capitol Building, Frankfort, Kentucky 40601. Further the undersigned certifies that a true copy hereof was served upon the Clerk of the Fayette Circuit Court, such clerk being the clerk of the court possessed of the record herein, by causing a true copy hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed as follows to wit: Robert M. True, Clerk, Fayette Circuit Court, Room 200, Courthouse, Lexington, Kentucky 40507.

The undersigned states that all parties required to be served are the parties named above, accompanied by the addresses of their

respective counsel, and that all such parties have been served, as herein certified.



WILLIAM C. JACOBS
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2464